Littler
Employment & Labor Law Solutions Worldwide

Littler Mendelson, PC
900 Third Avenue
New York, NY 10022.3298

Eric D. Witkin
212.497.8487 direct
212.583.9600 main
646.417.7546 fax
ewitkin@littler.com

January 18, 2017

VIA ECF

Hon. Edgardo Ramos
United States District Judge
United States Courthouse
40 Foley Square, Room 2203
New York, NY 10007

Re: *Bronx Ind. Liv'g Svcs., et al. v. Metropolitan Transit Authority, et al.* (No. 16 CV 05023)

Dear Judge Ramos:

On Defendants' behalf we reply to the January 17, 2017 letter by Plaintiffs' attorney opposing Defendants' request to limit initial discovery to the dispositive issue here. That issue is whether, as Plaintiffs allege in their Complaint ¶¶ 3 and 42, "it would have been technically feasible" to construct elevators at the Middletown Road station. Defendants deny that allegation.

The cases cited in Plaintiffs' January 17, 2017 letter and its attached copy of Defendants' November 10, 2016 letter all support Defendants' request to limit initial discovery. That proposal, as Defendants' November 10, 2016 letter stated (p. 2), does not bar later broader discovery. Staged discovery does not disadvantage Plaintiffs or run afoul of the standards for relevance and proportionality. The opposite is true. The cases Plaintiffs cite discuss the Court's broad latitude to control and ensure the proportionality of discovery. Here, staged discovery would resolve the issue of technical feasibility and spare all parties the burden, time and expense of discovery about tangential issues.

Further, Plaintiffs' contention that it is premature to limit discovery is undercut by their November 4, 2016 letter stating their intention to seek discovery regarding "Plaintiffs' rights and responsibilities under the disability laws cited in the Complaint, including whether the MTA excludes Plaintiffs from participation in or denies them the benefits of its services, programs, or activities, or otherwise subjects Plaintiffs to discrimination." The burden and expense of such broad discovery would be unnecessary if the issue of technical feasibility were resolved first. Plaintiffs' sole claim is that in 2013-14 Defendants were required by law to install elevators at the Middletown Road station. Since Plaintiffs' claim is based entirely on the failure to install such elevators, a determination that it was simply not technically feasible to place elevators at that particular location is necessarily dispositive.[1] The broad discovery Plaintiffs intend to seek is irrelevant to that claim. Staging discovery thus is more appropriate now than later.

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[1] *See* Fed. R. Ev. 401 stating that relevant evidence must be "of consequence in determining the action." *See also, Barbara v. MarineMax, Inc.*, 2013 U.S. Dist. LEXIS 67018 at *5 (E.D.N.Y. May 10, 2013) (party seeking discovery

The penultimate paragraph of Plaintiffs' letter asserts that the Federal Transit Administration ("FTA") "has not closed its inquiry" about elevators at Middletown Road and that "Plaintiffs are not aware of any additional correspondence" between Defendants and FTA after March 16, 2015. After Plaintiffs' counsel mentioned FTA at our January 12, 2017 conference, I told the Court that FTA never supported its claim that installation of elevators was "technically feasible" and had backed down from its 2016 threat to refer the matter to the Department of Justice ("DOJ") for enforcement. Attached are copies of the 2016 correspondence to which I referred: FTA's June 27, 2016 letter to the New York City Transit Authority ("NYCTA") threatening a DOJ referral (Exhibit 1), NYCTA's July 26, 2016 responsive letter to FTA (minus voluminous exhibits) explaining the bases for NYCTA's determination of technical infeasibility and noting FTA's failure to rebut it (Exhibit 2), and FTA's July 27, 2016 email reversing course by stating that it "will not refer this matter" to the DOJ (Exhibit 3). The attached correspondence, and the documents attached to NYCTA's July 26, 2016 letter to FTA, explain why the "technical feasibility" issue is dispositive here and thus support Defendants' request to limit initial discovery to that issue.

Respectfully,

Eric D. Witkin

EDW/jm
Encls.

cc: Michelle Caiola, Esq., Attorney for Plaintiffs
Rebecca Rodgers, Esq., Attorney for Plaintiffs

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must make a prima facie showing that the discovery sought is more than merely a fishing expedition). FTA's own Circular, FTA C4710.1, cites Department of Transportation ("DOT") Standards Section 106.5 defining the term "technically infeasible" as follows:

> With respect to an alteration of a building or a facility, something that has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member that is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features that are in full and strict compliance with the minimum requirements.

Appendix D of DOT regulation 49 CFR Sec. 37.43(b) explains that statutory requirements to make a facility accessible "to the maximum extent feasible" would *not* require entities "to make building alterations that have little likelihood of being accomplished without removing or altering a load bearing structural member unless the load-bearing structural member is otherwise being removed or altered as part of the alteration."